



DEPARTMENT OF STATE

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Washington, D.C. 20520

June 10, 1975

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MEMORANDUM

TO: D/LOS - Mr. Moore

FROM: D/LOS-L/OES - Bernard H. Oxman *BHO*

SUBJECT: LOS - Informal Single Negotiating Text:
PART II

This memorandum regarding "PART II" of the Informal Single Negotiating Text of May 7, 1975 responds to the request of the Executive Group of the NSC Interagency Task Force on the Law of the Sea for an analysis of major problems with the text. I solicited the personal ideas of other Committee II team members before preparing this memorandum, who were most helpful.

Summary Evaluation

"Part II" of the Informal Single Negotiating Text constitutes a good basis for negotiation, although we and others will have important problems with some articles. The overall structure of the Law of the Sea, and the overall approach of specific chapters of concern to the U.S., is satisfactory in this Part. While States will of course concentrate their efforts on their problems with the text, the preservation of its integrity as the basis for negotiation is of great importance both to the successful conclusion of the LOS Conference within the reasonably near future and, potentially, as a general frame of reference for States if the LOS Conference cannot be brought to an early conclusion. Whatever our specific problems with articles in "PART II" or, more importantly, with the treatment of the deep seabeds in "PART I", I strongly recommend that these general considerations regarding "PART II" be given considerable weight in framing our negotiating approach to the Informal Single Negotiating Text as a whole.

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State Dept. review completed

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Summary of Major Recommendations

1) Policy studies are needed to determine the acceptability of Articles 41, 128, and 129 (coastal State regulatory power in straits and archipelagoes), Articles 47 (1-3) and 73 (status of the economic zone and residual rights), Article 53 (tuna), and Article 124 (3) (definition of archipelagic sealanes passage).

2) There are major substantive problems with Article 18 (coastal State regulatory power in the territorial sea and limitations on the scope of pollution and safety regulations), Article 45 (enumeration of coastal State rights in the economic zone), Article 47 (4) (duty to comply with coastal State laws and regulations in the economic zone), Articles 49 and 71 (scientific research in the economic zone and on the continental shelf), Article 50 (link between allowable catch of fish stocks and MSY), Article 62 (definition of the continental shelf), Article 131 (oceanic archipelagoes of continental States), and Article 136 (territories under foreign occupation or colonial domination).

Scope of Paper

This paper is a preliminary identification and analysis of major problems in "PART II." It does not deal with tactics in any detail or with the many specific difficulties the article-by-article review may reveal. As a purely arbitrary technique of self-discipline, I have identified what I consider to be the most significant problem in each Part of "PART II"; however, several of our problems with one Part may be more important than any of our problems with another Part.

Part I - Territorial Sea and Contiguous Zone

The most important problem in Part I relates to the power of the coastal State to make laws and regulations in respect of innocent passage through the territorial sea under Article 18. There are two aspects to this problem. First there is no cross-reference to the pollution chapter

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in paragraph 1(f) regarding the power of the coastal State to make laws and regulations with respect to pollution. Accordingly, that power is not subject to a warship exception. The difficulty of course is that the coastal State probably has such power under existing law in the territorial sea; there is no warship exception in the Territorial Sea Convention. Accordingly, the problem is essentially one of failure to achieve a desirable improvement in the law. The second aspect of the problem is that paragraph 2 provides that laws and regulations shall not "apply to or affect the design, construction, manning or equipment of foreign ships or matters regulated by generally accepted international rules unless specifically authorized by such rules." This is relevant not only to coastal State pollution regulation, but to coastal State safety regulation under paragraph 1(a). This result is arguably incompatible with existing US legislation, although I should point out that I do not believe there is or should be unrestricted legislative power on safety or pollution questions if the effect is to hamper innocent passage. Before finally making up our minds, I would suggest a final review of the substance of the issue again in view of the fact that the coastal State right to enforce port entry conditions is confirmed in Article 22(2) and in view of the provisions of the pollution chapter.

The cross-reference to archipelagoes in Article 1 is of course dependent on a satisfactory archipelago chapter.

I believe the enumeration of activities considered to be prejudicial to the peace, good order or security of the coastal State in Article 16 should be reviewed. A more detailed appreciation of the text and the likely overall interpretation of its language is needed before we can reach any conclusion on the relationship between the text and a number of important US interests. For example, the article does not expressly say that the list is exhaustive. However, inclusion of such a long list, particularly coupled with the list item, "any other activity not having a direct bearing on passage", implies that the list is exhaustive. The presence in the list of some items which are not externally verifiable, such as those regarding research or survey activities, is obviously troublesome,

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but must be matched against the article as a whole, and the existing Convention which does not elaborate at all on the scope of the standard of prejudice to peace, good order, or security. It should be noted that paragraph 3 contains a newly articulated and entirely justified right (also contained in Article 15(2)) to render assistance to other persons, ships, and aircraft in danger or distress, and that article 21 contains a new and desirable prohibition on discrimination based on flag or destination of the ship.

Article 19, dealing with sealanes and traffic separation schemes, is not in its legal effect contrary to US policy. However, there is a political question as to whether to refer to tankers and ships carrying nuclear or other dangerous or noxious substances and materials in paragraph 2.

The requirement in Article 21 that the coastal State not "interrupt" innocent passage probably goes too far. It could result, either through an amended text or through interpretation, in watering down the important requirement in the article that the coastal State not "hamper" innocent passage.

The requirement in Article 30 that the coastal State may direct the "safe and expeditious route" by which a warship is required to leave the territorial sea requires study to determine whether this is a meaningful or detrimental increase in coastal State rights in practice, and whether there is advantage in the new requirement that the directed departure must be "safe."

I believe a geographic study of the scope of Article 5 regarding baselines around atolls and fringing reefs, and a legal study of the precise implications of the liability of a ship exercising the right of innocent passage under Article 23(1), should be conducted before we reach any conclusions regarding the substance or drafting of those articles.

The major question with respect to Article 33 (contiguous zone) relates to the tactics of keeping the zone narrow and keeping its content as specified in the article.

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Part II - Straits Used for International Navigation

I believe that Article 41, dealing with the right of the strait State to make laws and regulations relating to transit passage, may be the most important question. Here in particular I must emphasize the difference between substance and tactics. The substantive acceptability of Article 41 depends upon the precise interpretation of its language, particularly paragraphs 1(a) and (b), and the relationship of paragraph 5 to the rest of the article. I accordingly recommend that before reaching a substantive decision on this article, we undertake a legal study, both of its proper interpretation and of the degree of risk that it might be improperly interpreted.

I recommend that three other textual studies be undertaken before we reach any conclusions:

1) Article 35(a), excluding from the straits regime internal waters within a strait that were not previously considered high seas or territorial seas, should be carefully reviewed against the geography of the most important straits, and against the possibility of internal waters claims not based on a straight baseline system.

2) Article 39(3) (a), regarding the obligation of aircraft in transit to observe Rules of the Air established by ICAO, should be reviewed to ascertain whether in context it could be read as referring to a right of a State to deny overflight of its territorial sea.

3) The provisions of Article 40(4) regarding the need for international adoption of proposed sea lanes or traffic separation schemes should be reviewed in order to ascertain that the text in fact requires such action. In this connection, although it would be a strained interpretation, I am troubled that there is no link between paragraph 2, on the substitution of sea lanes or traffic separation schemes, and paragraph 4, dealing with international review. If this is an oversight, it might easily be corrected by the insertion, for example, of the word "such" before "sea lanes" in paragraph 4.

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I would note that the text of Article 35(c), regarding the exception for straits where there are international Conventions in force, does not conform exactly with the text we negotiated in that the words "the legal status of straits" are used rather than the words "the existing legal regime in straits". The States with which we negotiated may expect us to support a change.

The provisions of Article 44, preserving the Territorial Sea Convention regime of non-suspendable innocent passage in straits connecting the high seas with the territorial sea of a foreign State, should be reviewed in the context of our Middle East Policy.

The distinction in the text of the straits articles between high seas and economic zone is dealt with in the substantive discussions of the legal status of the economic zone and the definition of the high seas. However, I should point out that the effect of this style of drafting is to reinforce the conclusion that the economic zone and the high seas are equivalent insofar as navigation and over-flight are concerned.

Part III - The Exclusive Economic Zone

I believe the most comprehensive problem in Part III is Article 45, which summarizes the rights of the coastal State in the economic zone. In particular, the treatment of scientific research in paragraph 1(c) and of pollution in paragraph 1(d) do not contain cross references to the Convention chapters on this subject that would limit the scope of coastal State jurisdiction. This is legally inadequate, tactically prejudicial, and, of course, inconsistent with the Committee III single text. Moreover, at least as a negotiating matter, the use of the term "exclusive" jurisdiction in connection with scientific research further prejudices the situation. Although the absence of cross-references is not incompatible with limitations on the exercise of jurisdiction (eg. resources), it does imply comprehensive jurisdiction for that purpose which, with respect to vessel-source pollution and scientific research, is not desirable. The absence of a cross-

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reference in paragraph 1(b) to Article 48 presents a similar problem regarding installations, but this may require more careful consideration before we decide to raise the issue. While it is true that canons of legal interpretation would require a summary article such as Article 45 to be interpreted in the light of the detailed provisions which follow, I believe it is risky to rely on such an approach, particularly in the light of the emphasis placed on general opening articles by lawyers and judges trained in the civil law. Although the best solution may be to resort to the Evensen text system of cross-reference on the questions of installations, pollution and research, I think we should at least consider whether the rather obvious drafting mistake in the single text (which will be readily acknowledged by the developing countries on the pollution question) does not provide us with an opportunity to qualify the entire article, including the resource rights, with a cross-reference to the rest of the Convention.

The question of the legal status of the economic zone, and the related issue of residual rights, is a critical one. The inclusion of paragraph 2 in Article 47 makes important substantive and cosmetic changes in the Evensen text of benefit to us which have to be weighed against the exclusion of the economic zone from the definition of high seas in Article 73. Aside from the obvious fact that acceptance of paragraphs 1-3 of Article 47 and the definition in Article 73 would be dependent upon the satisfactory resolution of the scientific research question in the chapter on research, I would recommend a major study of the juridical and political implications of the first three paragraphs of Article 47 in conjunction with Article 73 before reaching a conclusion. In particular, I think we must consider whether paragraph 2 of Article 47, however delicately, says precisely what we have been seeking. Once again, on this issue, I must note the difference between substance and tactics.

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The requirement in Article 47(4) that States shall comply with coastal State laws and regulations creates a serious problem in my view. There is an imbalance with the corresponding coastal State duty in Article 45 paragraph 2. While the requirement may be technically accurate as a strictly legal matter since it can be read as referring to the exercise of fishing or ocean dumping rights, I believe that the implication, created largely by the placement of the clause in this article, that coastal State legislation can affect the exercise of the freedoms of the seas in the economic zone in comprehensive terms is highly undesirable, even if we were to accept limited legislative competence (eg. regarding ocean dumping). It is possible to write an acceptable text, placed in a different article, regarding the legislative competence of the coastal State in the economic zone and the duty to respect laws and regulations under the Convention; it is the placement and context in an article on high seas freedoms, rather than the idea of respect for laws and regulations, that creates the major difficulty in this article.

I think we should take a closer look at Article 48 (5) regarding safety zones. While continued adherence to the Continental Shelf Convention limitation of 500 meters is narrower than what we might have desired, the flexibility to go beyond 500 meters on the basis of recommendations by appropriate international organizations may be more flexible.

Article 49 regarding consent for scientific research in the economic zone is inconsistent with our position and infringes on the work of Committee III.

The achievement of our full utilization objectives requires that the coastal State base the allowable catch largely on the maximum sustainable yield. The text of Article 50 paragraph 3 is not clearly applicable to the determination of allowable catch under Article 50 paragraph 1. While this is an important issue, it is possible that we may be able to achieve our objective by a minor drafting correction in paragraph 3 which begins the sentence by referring to "allowable catch and other conservation measures."

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Article 51 should be examined to determine whether, as a practical matter, it is reasonably compatible with U.S. full utilization objectives. For example, in my opinion Article 51, paragraph 2 in fact establishes the relevant legal obligation, and that the use of the word "promote" in paragraph 1 cannot change this. The question of the list in paragraph 4 is troublesome. In my view, the requirement that the coastal State regulations regarding access "shall be consistent with the provisions of the present Convention" means that they must be consistent with the duty to give access to the surplus under paragraph 2. Others might argue that the fact that paragraph 2 contains a cross reference to paragraph 4 makes this reasoning circular. They might also argue that the provision of paragraph 4(h) allowing the coastal State to require landing of "all" of the catch is particularly incompatible with the interpretation I proffer.

I should note my view that the treatment of the point that the coastal State determines its own harvesting capacity in Article 51 paragraph 2 eliminates the problem of the earlier Evensen text, and that further consideration of this point is unnecessary.

With respect to Article 53 on tuna, I would strongly recommend that we consider it very carefully before determining that it is an unacceptable text. In my opinion we cannot and will not achieve a text which simply says that tuna are managed by organizations without some statement that they are also managed by coastal States. In concept, although perhaps not in wording, Article 53 follows the line we were taking in the negotiations, namely that the coastal State regulatory power over all fisheries in the economic zone is qualified, in the case of tuna, by the duty to work within the context of an organization. Moreover, while paragraph 1 makes it clearer than we would like that there is a harvesting capacity preference, the text of paragraph 2 also makes it reasonably clear that the organization will be dealing both with conservation and with allocation. I seriously doubt if any tuna text we negotiate will contain a significantly different structure, although language improvements are indeed possible. The key question is the intention of other States, particularly the Latins, regarding its implementation.

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Accordingly, I would rather concentrate in the forthcoming discussions with the Latins on the underlying practical questions of what the organization will do and how it will function than, for the time being, on the wording of Article 53. The results of an effort primarily directed at significantly altering Article 53 may be a worse text or a text whose implications are not agreed.

Article 54 on salmon contains an important textual difference from the negotiated salmon text; it uses the term "within the exclusive economic zone" rather than the term, intended to embrace territorial and internal waters, "within the limits" of the economic zone. Two questions are raised:

A. Is the text more advantageous to us as it stands?

B. Will States with whom we negotiated the text accept the text as it stands?

I would only recommend changing the text if the answer to either one of the above questions is "no". It should of course also be noted that there is some political opposition to the salmon text in the United States, and that our final attitude towards it must take into account our consultations with Congress and others.

While the substantive effect on the US is unobjectionable, I suspect the landlocked and "disadvantaged" States, and in particular the developed States among them, will be dissatisfied with Articles 57 and 58. Accordingly we should be careful to qualify our remarks on "PART II" of the text in a manner that takes into account information we receive regarding the reaction of the landlocked and "disadvantaged" States.

Article 61, on delimitation between neighboring States, coupled with the comparable Article (70) in the continental shelf section, will obviously require very careful study and review. In my opinion it comes surprisingly close to underlying US objectives, including our desire to promote a more certain investment climate,

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and to ensure that there are peaceful procedures for resolving potentially dangerous "territorial" disputes around the world. Nevertheless, the effect of the interim median line rule on the US, particularly in the Gulf of Maine, will require close examination in connection with this review. In terms of the practical dangers of serious conflict among States around the world, it is my opinion that this article would make a greater contribution to the avoidance of such conflict than virtually any other article in the entire single text.

Part IV - Continental Shelf

The major problem in Part IV is the absence in Article 62 of a precise definition and procedure for determining the outer limit of the continental margin. It would be difficult to estimate the geographic effect of the reference to the margin in a comprehensive LOS treaty without more precision; the end result could be much narrower or broader than expected. The text reflects the stage reached in negotiations on the subject at the time it was prepared; the inclusion of a definition and procedures resulting from further work in the Evensen Group next fall could be expected.

I would recommend another look at Article 65(3) on consent for delineation of the course of pipelines to make sure it does not go further than we intend.

With respect to revenue-sharing, the substance is of course dependent on the outcome of negotiations regarding the rate of contribution. However, the distinction between developed and developing countries permitted (albeit not required) by Article 69(3) is inconsistent with our view. The reference to individual negotiations between contributors and the Authority in Article 69(4), first sentence, is troublesome, particularly if this could be construed to require negotiation on the question of whether there would be contributions in cash or in kind. However, I doubt that any such result was intended; the sentence can be replaced by another one establishing a procedure for dealing with details (such as time and place of payment) not covered in the treaty itself.

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Article 70, on delimitation, is discussed in connection with Article 61 in the Economic zone section, which is substantively identical.

Article 71, on scientific research, is not only inconsistent with the US position; it is worse than Article 5(8) of the Continental Shelf Convention in that consultation with the coastal State is required before results are published.

While arguably not a major problem for us, the logic escapes me of including Article 72 on tunnelling in a Convention that would establish a fixed continental shelf limit and an international regime beyond that limit. In context, it could mean relief from coastal State obligations, eg. pollution and revenue-sharing. I suspect the landlocked, the common heritage enthusiasts, and coastal States suspicious of their neighbors will all seek its deletion.

Part V - High Seas

The question of the definition of the high seas in Article 73, the most serious question, has been discussed in connection with the economic zone (Article 47).

I recommend we check the texts of:

- (1) Article 74 to make sure the effect of the "peaceful purposes" qualification is analyzed;
- (2) Article 75(2) to make sure the reference to "other freedoms recognized by the general principles of international law" is unnecessary in view of the use of the term "inter alia" before the enumeration of freedoms.
- (3) Section 2 to make sure the cross-references to the economic zone are acceptable.

The question of ships employed in the service of international organizations should be studied in connection with Article 79.

We should prepare a coordinated US position on the question of suppression of illicit drug traffic and pirate broadcasting on the high seas in connection with articles 94 and 95.

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While a reference to the shelf is technically consistent with the article, the reference to areas "above the continental shelf" in connection with hot pursuit in Article 97(4) implies a special status for waters above the shelf. This is undesirable; the point should be redrafted.

Part VI - Land-locked States

We should ascertain whether landlocked States are satisfied with the elaboration of their right of access to an from the sea. Aside from our concern that agreement be reached on the issue, we might take a look at the substantive US interest in facilitating trade with landlocked countries.

PART VII - Archipelagoes

The most serious question relates to the term "rights of navigation and overflight in the normal mode" as the definition of archipelagic sealanes passage in Article 124 (3). This should be compared with the definition of transit passage in straits in Article 38(2) as "freedom of navigation and overflight". The use of the term "normal mode" in Article 124(3) makes this a closer question than it might seem, particularly since its meaning here would be distinguished from its use in Article 125(1)(c) (identical to Article 39 (1)(c)). If different definitions of straits transit passage and archipelagic sealanes passage are used, then a logical interpretation would be that differences in the substance of the regime are intended. A study of the text should be undertaken to ascertain if this is, on balance, an acceptable or perhaps even a preferable result.

The substance of the texts of Article 125(3)(a) with respect to the Rules of the Air, and Articles 128-29 with respect to coastal State regulations and sovereign immunity, are identical to those of articles 39(3)(a) and 41 respectively of the straits chapter; they should be reviewed together, of course bearing in mind possible differences between straits and archipelagoes.

There is a serious question as to whether Article 131 on oceanic archipelagoes belonging to continental States is politically acceptable. As a juridical matter it of course does not establish a regime for such areas, and is amenable

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even to a favorable interpretation that all the other rules of the Convention apply to such areas, perhaps with some change in wording. Moreover, because of the reference to "oceanic" archipelagoes, the text apparently does not apply to coastal archipelagoes such as those in the Canadian Arctic. On the other hand, the text may encourage claims that are not limited by a treaty definition of areas that can be enclosed or qualified by a right of archipelagic sealanes passage. Article 131 should be reviewed in connection with the analogous Article 130; in my opinion this should include a serious policy review in light of the problems of some of our allies such as Denmark and France, and should include an analysis of whether a neutral result (ie. ambiguity) on the issue is better for the US than agreement on the application of a good definition and a good transit regime to such areas.

Part VIII - Islands

Four questions are posed by the provision that rocks which cannot sustain human habitation or economic life of their own have no economic zone or continental shelf (but do presumably have a territorial sea and contiguous zone);

a) What rocks would in fact satisfy such stringent criteria?

b) Is the result acceptable to the US in terms of its own geography and that of its dependencies, including the northern Marianas? (It is my understanding from Mr. Wyle that Micronesia probably will oppose the rule but probably would not in the end regard it as highly prejudicial.)

c) Will the rule encourage demonstrations of habitation or economic life that could complicate the situation where there are territorial disputes in a manner detrimental to US interests?

d) Does the rule have any advantages in terms of delimitation or US navigation, manganese nodule or other interests?

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A legal/geographic study of the effect of the rule is needed to resolve these questions. We should also ascertain the reaction of the UK and other allies.

Part IX - Enclosed and Semi-Enclosed Seas

While the Chapter as drafted is harmless, and may even be advantageous to US fishing and pollution interests in the Gulf of Mexico and the Caribbean, we should be alert to attempts to reintroduce provisions giving the coastal States greater rights in such areas than they enjoy under the general articles of the Convention.

Part X - Territories Under Foreign Occupation or Colonial Domination

Article 136 raises major questions of domestic and foreign policy which need a full-scale review. At issue are the underlying future relationship between the US and its dependencies, the possible impact on Federal-State and Indian problems, and historic American anti-colonialist attitudes that may be reinforced during the bicentennial period. We should bear in mind that the existence of local resource wealth, including wealth resulting from the extension of coastal State jurisdiction over offshore resources, has fed centrifugal tendencies even within federally organized States such as Australia, Canada, and Nigeria, as well as the U.K.; any stable long-term result must take account of this fact among other considerations.

Part XI - Settlement of Disputes.

Article 137 does not specify which substantive articles would be subject to compulsory settlement. Our view is that, assuming appropriate exceptions in the compulsory settlement chapter, all articles should be included. In any event, Article 137 is only acceptable if it includes compulsory third-party settlement of the necessary substantive provisions. This should be made clear.

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